

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

SPIRIT AEROSYSTEMS, INC., ) AU:24-CV-00472-DII  
)  
Plaintiff, )  
)  
v. ) AUSTIN, TEXAS  
)  
W. KENNETH PAXTON, JANE NELSON, )  
)  
Defendants. ) OCTOBER 11, 2024

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TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE MARK LANE  
\*\*\*\*\*

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1 (Proceedings began at 9:32 a.m.)

2 THE CLERK: The Court calls the following for a  
3 Motion Hearing: 1:24-CV-472, *Spirit AeroSystems,*  
4 *Incorporated v. W. Kenneth Paxton and Jane Nelson.*

5 THE COURT: Good morning, gentlemen. Let's  
6 start with announcements. Tell me who you are and who  
7 you represent. We'll start over here on my left.

8 MR. MARTENS: Thank you, Your Honor. Good  
9 morning. My name is Matthew Martens, and I represent  
10 Spirit AeroSystems, Inc.

11 MR. MCCARTY: Darren McCarty. I also represent  
12 Spirit AeroSystems.

13 THE COURT: All right.

14 MR. BAASCH: Ryan Baasch on behalf of the  
15 Office of the Attorney General and Jane Nelson.

16 MR. KENNEDY: Matthew Kennedy for the Office of  
17 the Attorney General and Jane Nelson.

18 THE COURT: Welcome, gentlemen. Messrs. Baasch  
19 and Kennedy, Mr. Baasch I know you have something filed  
20 authorizing you to be part of this case. I assume  
21 Judge Pitman is going to grant that, so I'm not that  
22 concerned about that. And then, Mr. Kennedy, as I  
23 understand it from my courtroom deputy, you are licensed  
24 but not yet -- we haven't formally entered you on the  
25 case; is that right?

1 MR. KENNEDY: That's correct, Your Honor.

2 THE COURT: All right. We'll get that done.

3 Okay. Obviously, in preparation from the  
4 hearing I've read what you-all have filed. It's quite  
5 thick, obviously, and it took a while. I also want to  
6 apologize to you. I mean, this issue has been lingering  
7 since July. Oh, I could give you the reasons why, but  
8 they're not really good other than just personnel changes  
9 and other issues. So I hope you'll forgive me for that.  
10 But here we are, and now we will resolve the issue that  
11 you two have joined.

12 Having read all the material, I'll share with  
13 you, you can't read everything and remain a blank slate.  
14 When you read everything, you start drawing some  
15 conclusions and having some questions. So, with your  
16 indulgence, I'm definitely going to have you guys come up  
17 and speak to your points, but don't be surprised if  
18 during your discussion I interrupt you and ask you  
19 questions.

20 One thing I kind of want to get clear before we  
21 get started is -- and this questions is directed, I  
22 guess, to the plaintiffs -- just to be clear, you are --  
23 you are only moving forward on the facial  
24 constitutionality of the statute or not -- not  
25 as-applied?

1 MR. MARTENS: We state both facial and  
2 as-applied in our papers. I think the analysis --

3 THE COURT: You spend 99 percent of your  
4 briefing on facial.

5 MR. MARTENS: I think that the analysis ends up  
6 becoming the same. I think that they're trying to  
7 defend, as we'll explain, by rewriting the statute by the  
8 way they've crafted the May 13th request to examine.  
9 But, ultimately, I don't think that you can change what  
10 the statute says based on the RTE. And so, ultimately,  
11 we're challenging the statute. That's what we've  
12 challenged. We've brought a challenge to the statute.  
13 Obviously, they have applied it to us, or they're trying  
14 to apply it to us through the RTE. But you're right.  
15 The focus of our challenge is the facial challenge.

16 THE COURT: And I don't -- to be clear, it's  
17 more than focus. I mean, if this was an as-applied  
18 challenge, I would have expected a lot more here about  
19 the fact that you only have 90 employees in Dallas that  
20 are related to Spirit and 20,000 somewhere else and  
21 Spirit's incorporated out of Delaware. And you make  
22 those basic statements, but you don't make any arguments.

23 MR. MARTENS: I don't think that those impact  
24 the analysis, either facial or as-applied. It's  
25 as-applied to us in the sense that they have served an

1 RTE on us. But I don't think that there's any other  
2 facts that are relevant to the as-applied challenge.  
3 Ultimately, I think --

4 THE COURT: Well, I disagree. I'm just telling  
5 you --

6 MR. MARTENS: Okay.

7 THE COURT: -- just to be clear, any ruling I  
8 make here is going to be on facial.

9 MR. MARTENS: Okay.

10 THE COURT: I just don't think you've made the  
11 as-applied argument. Now, having said that, depending on  
12 what happens, I don't see what prevents you from making  
13 the as-applied argument next.

14 But they are different. And one of the reasons  
15 I even raise it is because of all the cases I've read  
16 about this, some courts don't even recognize the  
17 distinction between the two analyses, and some do. Most  
18 seem to be as-applied. Couldn't find much in the way of  
19 facial constitutionality, particularly in the wake of  
20 *Los Angeles v. Patel*. So I'm just -- I'm cabining this  
21 to facial.

22 MR. MARTENS: And I'll keep my argument  
23 accordingly.

24 THE COURT: Okay. Well, with that, you're our  
25 plaintiff. I think number-wise, the Attorney General's

1 Office got in first with their cross-motion for summary  
2 judgment. But I'll let you go first.

3 MR. MARTENS: Thank you, Your Honor. May it  
4 please the Court?

5 THE COURT: Sure.

6 MR. MARTENS: Matthew Martens for Spirit  
7 AeroSystems.

8 I think I should -- I'll start with what I  
9 think is undisputed here. No one disputes that the  
10 Fourth Amendment as interpreted in *Patel* requires an  
11 opportunity for pre-compliance judicial review of an  
12 inspection, of an administrative subpoena, of a request  
13 to examine. However, characterized, *Patel* requires the  
14 opportunity for pre-compliance judicial review.

15 And I think no one also disputes the Texas  
16 RTE statute, the request to examine statute, on its face  
17 provides no mechanism for such review. There's no --  
18 unlike many of the other CID statutes, where similar  
19 provisions with regard to other investigative authority  
20 that the Attorney General has where there is specifically  
21 identified a statutory basis to conduct a review -- to  
22 conduct some judicial review, either through a motion to  
23 enforce by the Attorney General or a motion to quash,  
24 there is no such mechanism in RTE statute itself.

25 And, in fact, Texas law precludes that type of

1 review for two reasons: First, Texas law, both the RTE  
2 statute in its text and structure preclude review. And,  
3 secondly, the Texas state law of sovereign immunity  
4 precludes such review.

5 So I'll discuss each of those in order.

6 So first with regard to the text and structure  
7 of the RTE statute, the use of the word "immediate" in  
8 defining the time for compliance precludes review as a  
9 simple temporal matter. The statute does not allow time  
10 for review. In fact, in the *Humble Oil* decision which we  
11 place great reliance on, the court there explained what  
12 "immediate" meant and how the statute actually operates.

13 What the court said in *Humble Oil*, is that the  
14 statute, quote, requires every corporation to permit the  
15 Attorney General or any of his assistants or  
16 representatives to make examination of the record of --  
17 records of the corporation as often as they may deem  
18 necessary immediately after presentation of a request for  
19 such examination.

20 So if the recipient of the letter is, by  
21 statute, as interpreted in *Humble Oil* required to  
22 immediately provide for inspection upon presentation of a  
23 letter of request, then the statute necessarily doesn't  
24 contemplate an opportunity for review. Temporally, you  
25 can't even obtain such review.

1           And the Attorney General himself argued in the  
2   *Annunciation* case that "immediate" means what it says.  
3   In fact, he argued to that court that that word  
4   "immediate" should be interpreted, his words, quote, as  
5   written. And he then cited dictionaries for the  
6   proposition that "immediate" means quote, right away, and  
7   further said that any delay in compliance is, quote, a  
8   matter of grace.

9           So I would respectfully suggest that it would  
10   be useful to hear whether the Attorney General stands by  
11   the position, the interpretation of the statute that they  
12   advanced in the *Annunciation House* case, where they said  
13   "immediate" was clear, it means right away, it should be  
14   interpreted as written.

15           And, in fact, in that case, when someone  
16   attempted in a one-day grace period to bring a lawsuit,  
17   the Attorney General deemed them out of compliance and,  
18   as a result, sought to -- sought to file a *quo warranto*  
19   proceeding.

20           So the Attorney General's position on the  
21   meaning of the statute is exactly the position we've been  
22   advocating, which is that the statute as written  
23   precludes the idea of judicial review because of the  
24   temporal requirement of immediate compliance.

25           But that's not the only reason I think that the



1 text and structure of the statute preclude judicial  
2 review. The Attorney General's unlimited discretion  
3 under the RTE statute further confirms that there is no  
4 judicial review contemplated under the statute.

5           Again, I go to the *Humble Oil* decision where it  
6 says that the RTE statute, quote, grants to the Attorney  
7 General the full and unlimited and unrestricted right to  
8 examination of the corporation's books and records at any  
9 time and as often as he may deem necessary. The court  
10 went on to say that it's a right of unlimited visitation  
11 and seizure.

12           If it's unlimited and you have -- if it's an  
13 unlimited right to inspect and you have to immediately  
14 allow inspection, then the text and structure of the  
15 statute necessarily preclude any opportunity for judicial  
16 review.

17           And that's what *Patel* forbids. That is in --  
18 that is in no way distinguishable from the city ordinance  
19 at issue in *Patel*, where the police could show up, demand  
20 immediate access to the records, and the immediate -- and  
21 if you didn't provide immediate access, you could be  
22 arrested and charged with a misdemeanor.

23           Here you can be arrested, charged with a  
24 misdemeanor, and lose your right to do business.

25           So on its face, the text and structure of the

1 RTE statute preclude any judicial review by the temporal  
2 requirement of immediate access and by the lack of any  
3 limitation or, as the *Humble -- Humble Oil* court put it,  
4 the full and unlimited and unrestricted right to  
5 examination. You can't have an immediate access  
6 requirement and an unlimited right to examination and  
7 have, in that structure, judicial review. So on its  
8 face, the statute does not allow what *Patel* requires.

9 But, secondly, even if I'm wrong about that,  
10 even if the statute didn't have an immediacy requirement  
11 and didn't have unlimited right to inspection, under  
12 Texas sovereign immunity law, a lawsuit to -- against the  
13 Attorney General or against the Office of the Attorney  
14 General to seek injunctive relief or other review of the  
15 actual request is precluded.

16 You could under -- under 1983, and we have  
17 here, brought an action to have the statute declared  
18 unconstitutional. And you can under Texas law,  
19 notwithstanding the doctrine of sovereign immunity, bring  
20 a lawsuit to have the statute declared unconstitutional.

21 What you can't do with the doctrine of  
22 sovereign immunity is bring an action in state court for  
23 a review of the reasonableness of the particular request  
24 that you've received.

25 THE COURT: Why not?

1 MR. MARTENS: Because the doctrine of sovereign  
2 immunity allows two types of lawsuit: You can bring an  
3 action against the Office of the Attorney General to have  
4 the statute declared unconstitutional, but that doesn't  
5 get you review of the particular request. Or you can --  
6 and so the -- the AG has said, well, you could bring an  
7 *ultra vires* action against the Attorney General. And  
8 that's not true.

9 And the reason it's not true is because what  
10 the court in an unfortunately named decision, also named  
11 *Patel*, also from 2015, this one from the Texas Supreme  
12 Court, explained the doctrine of sovereign immunity. And  
13 what they said is that, quote: To fall within the  
14 *ultra vires* exception, a suit must allege that a state  
15 official acted without legal authority or failed to  
16 perform a purely ministerial act rather than attack an  
17 official's exercise of discretion.

18 So we can't bring -- we cannot fit within the  
19 *ultra vires* action because the Texas Supreme Court's  
20 decision in *Patel* says you could bring a lawsuit saying  
21 the statute's unconstitutional, but we can't bring the  
22 action we want to bring, which is to challenge his  
23 exercise of discretion with regard to this particular  
24 RTE, and to raise our objections to its scope, its  
25 breadth, its burdensomeness, whether or not it seeks

1 documents outside the jurisdiction, whether or not it  
2 seeks documents that are actually conceivably covered by  
3 state law. All the arguments you would normally make in  
4 response to, for example, a civil investigative demand  
5 and where you would -- when there's a civil investigative  
6 demand, get an opportunity to litigate before a Texas  
7 state court, we can't bring. *Patel* is perfectly clear on  
8 this.

9           And so that's the problem. Under the doctrine  
10 of state sovereign immunity, even if the statute didn't  
11 preclude in its text and structure an action for -- for  
12 the review, sovereign immunity precludes us from bringing  
13 that type of case.

14           Now, the AG has identified a number of cases  
15 that he thinks establish the right to bring an injunctive  
16 action of that sort, where we would fight over the  
17 particular exercise of discretion, to use *Patel's* words.

18           So he cites the Supreme Court's -- the State's  
19 Supreme Court's decision in *Zurawski*, just this year.  
20 But that case actually supports the very point I'm  
21 making, where in the -- the relevant excerpt it says that  
22 you don't plead a valid declaratory judgment act claim  
23 when -- when you -- I'm sorry. You do -- you can bring a  
24 valid claim when you challenge the validity of a statute,  
25 but you can't have a valid claim where you challenge the

1 officer's actions taken in applying the statute.

2           That's the distinction the court drew. You can  
3 challenge the statute. You can't challenge the exercise  
4 of discretion under the statute. So *Zurawski* says  
5 exactly what *Patel* says. It draws the same line.  
6 *Ultra vires* is not for challenging the exercise of  
7 discretion. It's for challenging the statute.

8           So the AG I suspect will also cite a case  
9 called *Chesterfield Finance*, a case from 1959 in the  
10 Texas Court of Civil Appeals. There's no discussion of  
11 sovereign immunity in that case, and for good reason.  
12 Because in that case the argument made is that, quote,  
13 the AG was, quote, without authority, which is what is  
14 permitted under the -- under the *ultra vires* exception.  
15 Again, as *Patel* says, you can bring an *ultra vires* action  
16 to say that the AG was, quote, without legal authority or  
17 failed to perform a ministerial act, but you can't bring  
18 one challenging his discretion.

19           In *Chesterfield*, though it doesn't discuss  
20 sovereign immunity, it probably doesn't discuss it  
21 because there the allegation was that the AG was, quote,  
22 without authority.

23           The AG also relies on a case called *Alliborne*.  
24 So there's two cases, actually, *Alliborne* and *Cotropia*  
25 that the AG relies on, both unpublished decisions.

1 Neither of them establishes that our position is  
2 incorrect with regard to sovereign immunity.

3           And the reason is because both *Alliborne* and  
4 *Cotropia* were cases involving administrative subpoenas  
5 issued by the Texas Medical Board. And the relevant  
6 provision of the Texas Medical Board statute actually  
7 authorizes litigation over subpoenas. Texas Occupational  
8 Code, Section 153.007 authorizes there to be litigation  
9 over subpoenas issued by the medical board and for that  
10 litigation to be conducted by the AG.

11           And that's our point, is that if there's going  
12 to be a waiver of sovereign immunity, it has to be by the  
13 legislature. That's what *Patel* says and that's what the  
14 consistent case law from the Texas Supreme Court says, is  
15 that the AG can't waive sovereign immunity, only the  
16 legislature can waive sovereign immunity, and the  
17 *ultra vires* exception is one to challenge legal  
18 authority, not discretion.

19           So for all those reasons, both because of the  
20 text and structure of the RTE statute and because of  
21 doctrine of sovereign immunity, we lack the mechanism  
22 that *Patel* says you have to be -- you have to have for an  
23 inspection, a request, an administrative subpoena in  
24 order for those to be compliant with the Fourth  
25 Amendment.

1           THE COURT: Let me elaborate briefly on where I  
2 got started with whether this is a facial or an  
3 as-applied challenge. Again, with all due respect, you  
4 mention "as-applied" once or twice, but it's really not  
5 the focus of your briefing. And I prepared for this as  
6 though this was facial only.

7           The reason I say that is I would have thought I  
8 would have seen much more with why -- like, for instance,  
9 more about the fact that the AG's office is suddenly  
10 interested in air transportation when, historically, the  
11 State doesn't have any part to play in that.

12           Or the whole DEI request that the AG's Office  
13 made, I would have thought that if this was an as-applied  
14 challenge, I would have had a whole lot on that. And  
15 there really wasn't.

16           MR. MARTENS: Well, the reason for that is  
17 because those are the types of arguments we would make in  
18 state court. In other words, if we were in there  
19 challenging the statute -- challenging, sorry, the  
20 request to examine, we'd be arguing the AG doesn't have  
21 any authority to investigate this, he doesn't have any  
22 jurisdiction over air -- airplane construction, he  
23 doesn't have any jurisdiction --

24           THE COURT: Right.

25           MR. MARTENS: But those are the arguments I

1 want to make in state court.

2 THE COURT: I understand. And those are  
3 as-applied arguments.

4 MR. MARTENS: No. I think that those are  
5 arguments about --

6 THE COURT: Reasonableness.

7 MR. MARTENS: -- about his authority to  
8 investigate his state law investigative authority. Those  
9 are types of arguments I would be making in state court.  
10 I'd be arguing that he's reaching outside the territorial  
11 bounds of the State. I'd be arguing about whether or not  
12 he can investigate DEI. I'd be arguing about whether --  
13 but those are all arguments about the reach of his state  
14 law authority. I'm making -- I'm saying the statute has  
15 a more fundamental problem, which is I can't even get  
16 that review.

17 THE COURT: I get that. And so earlier you --  
18 when we got started, you said facial and as-applied, and  
19 I told you I thought you had just made facial arguments.

20 MR. MARTENS: Right. And that's why I'm trying  
21 to focus my argument here, is the statute as written, on  
22 its face, does not allow for the judicial review I'm  
23 entitled to.

24 THE COURT: Right. I'm not criticizing you.  
25 I'm just -- I want to make sure that no matter what I'm



1 writing or what I'm dealing with, I'm on the right  
2 target.

3 So, really, you haven't made an as-applied  
4 argument for the reasons you just stated. You feel that  
5 you can only make those in a state court action which  
6 you're otherwise not authorized to ask -- or ask for,  
7 given the RTE's language, right?

8 MR. MARTENS: I think that those arguments are  
9 not *Patel* arguments is what I would say.

10 THE COURT: Okay.

11 MR. MARTENS: And so what I have made is a  
12 *Patel* argument, and I do think I've made it -- I  
13 understand Your Honor disagrees. I do think I made the  
14 *Patel* argument as-applied. I have not made other  
15 arguments, as we've identified, the DEI issue or the  
16 aircraft manufacture issue, because those are the type of  
17 arguments that I would want to raise in a state court  
18 proceeding where I would say the AG can't issue this  
19 request because it's beyond his state law investigative  
20 power.

21 THE COURT: The reason I'm bringing all this up  
22 is I'm wondering how much further I'm supposed to go past  
23 just the review of the statute itself. You know, I  
24 understand this litigation is centered on what's  
25 happening between the Attorney General's Office and

1 Spirit. I get it.

2 MR. MARTENS: Yep.

3 THE COURT: But how much further afield do I go  
4 in just reviewing the statute? How much do I get into  
5 the facts of the case? For instance, I fully expect the  
6 Attorney General's Office to say, oh, Your Honor we don't  
7 have -- there's not a problem with the statute because we  
8 provided 20 days' time, and we encouraged Spirit to seek  
9 pre-compliance review. So for those reasons the statute  
10 remains viable.

11 How much do I get into that when I'm making a  
12 legal analysis as to whether or not the statute itself is  
13 constitutional?

14 MR. MARTENS: We think that you analyze the  
15 statute and only the statute. The AG cannot, through a  
16 RTE and throwing some language in there, rewrite the  
17 statute. As he said in *Annunciation House*, you  
18 interpret the statute, quote, as written, not as the  
19 Attorney General would like it to be written. The  
20 Attorney General tries to add all these new provisions  
21 into his May 13th RTE to say, Well, we wouldn't object to  
22 jurisdiction and we'll give you these number of days.  
23 That's not what the statute says.

24 THE COURT: All right. Let me ask you this:  
25 You articulated somewhere in the briefing, but what edits

1 have been made to the statute by the AG's Office in this  
2 case?

3 MR. MARTENS: So the AG can't edit the statute.

4 THE COURT: I understand that. But what have  
5 they --

6 MR. MARTENS: The AG has tried to.

7 THE COURT: That's my question.

8 MR. MARTENS: Yeah, yeah. The AG has tried to  
9 say, I think, two things: One, that we will give you I  
10 think it's 20 days to comply. I don't remember if it's  
11 10 or 20, but that's not the key point. And then the  
12 other thing is he has included language in the May 13th  
13 RTE that says that they would not object to jurisdiction.

14 THE COURT: What about the part of the RTE in  
15 May that was served that said we won't object to  
16 pre-compliance review?

17 MR. MARTENS: So that's not exactly what they  
18 said.

19 THE COURT: Okay. Well, tell me what they  
20 said.

21 MR. MARTENS: What they said is that they  
22 wouldn't object to the jurisdiction of a state court if  
23 we were to file an injunctive action. And here's that --  
24 here's the problem with that: They can't waive sovereign  
25 immunity. The AG cannot waive sovereign immunity. We

1 cite the cases in our brief that the only party that can  
2 waive sovereign immunity is the legislature.

3 And so while the AG -- and sovereign immunity  
4 is a jurisdictional issue under Texas state law, and  
5 *Patel* explains that. And so when they say we won't  
6 object to jurisdiction, meaning we won't raise sovereign  
7 immunity, that doesn't solve anything. The court has an  
8 independent obligation to evaluate whether it has  
9 jurisdiction, and the AG can't waive that.

10 THE COURT: Any other edits? I mean, for  
11 instance, the whole criminal penalty, haven't they  
12 represented to you that they're not going to do that?

13 MR. MARTENS: They -- they have explained that  
14 they don't believe they have the authority to enforce  
15 criminally. Again, the question -- but they haven't  
16 denied that there is statutory authorization for district  
17 attorneys. And it makes no difference to the *Patel*  
18 analysis who can enforce criminally.

19 THE COURT: I agree.

20 MR. MARTENS: I mean, that was true in *Patel*  
21 itself. The police officer doing the inspection couldn't  
22 do anything other than arrest. He couldn't initiate  
23 prosecution. That had to be done by another office. And  
24 the court didn't find just the fact that the prosecution  
25 authority versus the arrest authority was divided.

1 Similarly here, the AG staff can arrest, and a local  
2 district attorney will make a decision whether to  
3 prosecute. Whether or not that person does prosecute,  
4 again, is beside the point. There was no evidence that  
5 anybody had been prosecuted in *Patel*.

6 But you -- but what's not required is to force  
7 a business person to stand there on the spot and say,  
8 well, I'm going to try -- I'm going to resist on the  
9 theory that maybe the DA won't prosecute me.

10 The fact is there's -- again, we're bringing a  
11 facial challenge. On its face the statute says that  
12 we -- that the officials in my company, if they don't  
13 comply, could be criminally prosecuted.

14 THE COURT: Any other edits?

15 MR. MARTENS: I don't believe that there are  
16 any other provisions in the May 13th RTE that the  
17 Attorney General has added to try to solve the statutory  
18 problems.

19 THE COURT: Okay. Okay. Thank you.

20 MR. MARTENS: Thank you.

21 THE COURT: All right. Who is speaking for the  
22 AG?

23 MR. BAASCH: I am, Your Honor. Thank you,  
24 Your Honor. We're here in an unusual posture today.  
25 Spirit is complaining that it cannot obtain

1 pre-compliance review of a subpoena that was issued  
2 nearly five months ago.

3 Yet here we are undergoing pre-compliance  
4 review, where Spirit has not suffered and is at no risk  
5 of suffering, a single penalty for noncompliance over the  
6 last five months.

7 Whatever flaws you might think exist in the  
8 statute, and I intend to address all of them today, it  
9 should be clear that Spirit is in no position to raise  
10 them. The statute is not facially invalid. It can be  
11 constitutionally applied in at least some applications,  
12 including this one. And the court should not indulge  
13 Spirit's invitation to apply the canon of constitutional  
14 collision.

15 If Spirit's worst fears about the statute come  
16 to light in a future setting, then that future  
17 hypothetical subpoena recipient can raise an as-applied  
18 challenge. Spirit's pitch for the Court to construe the  
19 statute in the most unconstitutional way imaginable and  
20 then to declare it facially invalid does not pass muster.  
21 And I respectfully submit, Your Honor, I've never seen a  
22 party stretch and strain like Spirit has here to say that  
23 it has no rights under state law when we insist that it  
24 does.

25 I'm happy to proceed today however the Court

1 would find most beneficial, but my plan is to proceed as  
2 follows, with the assistance of a slide deck I've  
3 prepared for the Court's convenience. With your  
4 indulgence, I'll start that slide show now, and I can  
5 hand Your Honor a paper copy of the deck as well, if you  
6 would wish.

7 THE COURT: Sure. And I like making these a  
8 part of the record. Do you have an extra copy that I can  
9 give the clerk?

10 MR. BAASCH: I do, Your Honor.

11 THE COURT: I'll give her mine after this. Is  
12 that your only copy?

13 MR. BAASCH: Well, I'm going to point at the  
14 screen, so I'm happy to give her mine.

15 THE COURT: All right.

16 MR. BAASCH: If this is working, that is.

17 THE COURT: Sam, just mark that as  
18 Defense Exhibit 1.

19 MR. BAASCH: Well I apologize, Your Honor.  
20 While my assistant helps me with the -- well, here we go.  
21 Fantastic.

22 Okay. As I was indicating before we got the  
23 slide show up, I'd like to proceed as follows: First I'd  
24 like to talk a bit about *City of Los Angeles v. Patel*.  
25 That case is the basket where Spirit places all of its

1 proverbial eggs, so I think it's important to explain the  
2 reasons why that case came out the way it did. Second,  
3 I'll say a few words about the RTE statute. Third the  
4 facts about why this particular RTE was issued to Spirit.  
5 I don't think, because they're not making an as-applied  
6 challenge, given the way they've litigated this suit, I  
7 don't think the facts of the underlying investigation  
8 really matter much. I don't think Your Honor needs to  
9 burden yourself with understanding those facts to resolve  
10 this motion.

11 THE COURT: I agree. But I'll share this with  
12 you, and take this for what it's worth: It seems like a  
13 very aggressive use of the RTE statute by the Attorney  
14 General's office to target an aircraft manufacturing  
15 company that is, again, incorporated in another state,  
16 primarily operates in another state, and has, I don't  
17 know, one-one-hundredth or one-one-thousandth of its  
18 employees are in Dallas, the rest are somewhere else, for  
19 aircraft accidents and crashes that are the primary  
20 jurisdiction of other entities.

21 It just -- because it's such an aggressive use  
22 of the Attorney General's perceived powers under the RTE,  
23 it invites stricter scrutiny by a court. And that's one  
24 of the reasons we're here, I think. So I just wanted to  
25 share that thought with you.



1 MR. BAASCH: Certainly. I understand that,  
2 Your Honor. And that's why I'll explain a little bit  
3 about the investigation and why we do think it's within  
4 the scope of our authority.

5 Fourth, I'd like to spend the bulk of my time  
6 explaining the many options that Spirit has for  
7 pre-compliance review and addressing some of the things  
8 my friend on the other side said before me. And then,  
9 fifth, I'll address where all of their other arguments  
10 fail.

11 So starting with *Patel*, I think the facts of  
12 *Patel* are pretty straightforward. There was a Los  
13 Angeles municipal ordinance that required hotels to keep  
14 certain records and to share those records with law  
15 enforcement whenever law enforcement showed up and  
16 demanded them. The court held that the ordinance was  
17 facially unconstitutional.

18 And I think there was three features of that  
19 ordinance and the city's application of it that really  
20 explain why that was. The first critical feature was  
21 that the ordinance allowed the City to conduct  
22 on-the-spot arrests, and the court emphasized this in its  
23 opinion. I think that's extremely important because,  
24 under the court's case law, the availability of  
25 pre-compliance review is necessary before the subpoena

1 recipient before the other party suffers some kind of  
2 penalty.

3           So in *City of Los Angeles v. Patel*, the penalty  
4 is arrest on the spot if you resist. You have no ability  
5 to get pre-compliance review, because either you comply  
6 on the spot or you're subject to arrest. That's not the  
7 case here, as I'll explain later.

8           The second critical feature of that case is  
9 that the City said in its briefing that the ordinance had  
10 to be enforced this way; that there could not be  
11 pre-compliance review. The City said it would be  
12 worthless, it would be futile, to allow hotel operators  
13 to have time, such as under an administrative subpoena,  
14 to actually gather up the documents and submit them.

15           The City complains in its briefing to the  
16 Supreme Court that, if they allowed hotel operators to do  
17 that, the hotel operators might destroy the records,  
18 might falsify them, et cetera, et cetera. And so they --

19           THE COURT: But isn't that the same argument  
20 that one of your colleagues made out with -- in  
21 *Annunciation House*.

22           MR. BAASCH: Yes. And I'm very familiar with  
23 the *Annunciation House* case, Your Honor, and I'm very  
24 happy to talk about it. I can talk about it now. I was  
25 going to get to it on a future slide.

1           THE COURT: No. You keep going. I just -- I  
2 couldn't help it.

3           MR. BAASCH: I will emphasize about  
4 *Annunciation House*, and I'll say more about this later,  
5 that an *Annunciation House* is an example where an  
6 as-applied challenge might have more teeth. Maybe the  
7 statute is unconstitutional in certain applications. I'm  
8 certainly not saying that about *Annunciation House*.  
9 There are special facts pertinent to the *Annunciation*  
10 *House* case that made that case special. But it's really  
11 an as-applied challenge that hones on those particular  
12 facts. The facts here are nothing like that.

13           THE COURT: Well, we will talk about that more.  
14 I'm just sharing with you the AG's Office made the very  
15 same argument as it relates to we have to get them right  
16 away, otherwise, the receiving party might destroy the  
17 evidence. That's the same argument you made in  
18 *Annunciation House* was made in *Patel* in the Los Angeles  
19 case.

20           MR. BAASCH: Certainly, Your Honor. I think  
21 that the core distinction that I just want to emphasize  
22 here is that the City in *Los Angeles v. Patel* said they  
23 needed the records on the spot every single time.

24           *Annunciation House* is just one example, the  
25 only example in the last 100-plus years, where our office

1 has taken that position that any party to this litigation  
2 can even identify.

3           The third point that I want to emphasize about  
4 *City of Los Angeles v. Patel* is that the court took the  
5 City at its word, emphasizing that the City did not even  
6 attempt to argue that pre-compliance review could ever  
7 occur. And it's obvious from the City's briefs why the  
8 court made that -- reached that conclusion. The City  
9 said it would never allow pre-compliance review. I'm  
10 going to argue the very opposite today.

11           So that's *City of Los Angeles v. Patel*. The  
12 second point that I want to discuss is the RTE statute  
13 just very briefly. I think we're all probably familiar  
14 with the RTE here.

15           One point I'd emphasize in addition to just the  
16 relevant textual provisions that I have on the screen is  
17 that the statute is over 100 years old. It's not  
18 elegantly written. It's not how a legislature would  
19 write a statute like this today. The statute was written  
20 decades before some of the Supreme Court seminal case law  
21 on administrative subpoenas, searches, and the like. It  
22 was written at the advent of the administrative state and  
23 the federal government, much less the state government.  
24 It's certainly not elegantly crafted. And I think that  
25 that's why there's some trickiness to understanding

1 exactly how it should apply in the 21st century.

2           None of that makes it unconstitutional. So  
3 four -- very briefly, four provisions that I think are  
4 relevant here. The first is that corporations shall  
5 permit the Attorney General access to records. The  
6 second is that we must make a written request to the  
7 corporation, and then the corporation shall immediately  
8 give us the records. The third is the potential  
9 forfeiture of the right to do business in Texas if a  
10 corporation fails to comply. And the fourth provision is  
11 the potential -- is the misdemeanor penalty.

12           So next I'd like to say a word about the  
13 underlying investigation, particularly because Your Honor  
14 asked about it. I think it's public record at this point  
15 that there have been very many highly public incidents  
16 about defective parts on Boeing planes. Spirit is a  
17 parts supplier for Boeing, including for certain parts  
18 that have been the subject of those public controversies.

19           So the vast majority of the things that we ask  
20 about in the request to examine, the vast majority of the  
21 records that we're seeking, are related to allegations  
22 that were made in a class action complaint against  
23 Spirit. That class action complaint is very thorough. I  
24 don't think it's necessary for Your Honor to read it.  
25 But if you do, it would -- I think it would underscore

1 why the State has so many concerns with Spirit.

2           And the class action complaint alleges in over  
3 100 places -- I think that the word "misleading" occurs  
4 over 100 times in this class action complaint, that  
5 Spirit repeatedly misled investors and the public as to  
6 certain flaws in its manufacturing process and in the  
7 parts that it was supplying to Boeing.

8           Regardless of how many employees Spirit has in  
9 Texas, that's a highly relevant set of facts for Texans,  
10 because Texans fly on Boeing aircraft, obviously. And so  
11 Texans are indirect consumers of Spirit parts.  
12 Regardless of whether Spirit had a facility in Dallas or  
13 not, this is something the Attorney General's office  
14 would be entitled to investigate and would have a very  
15 strong interest.

16           THE COURT: What do you mean, if they didn't  
17 have it -- they have no presence here. You wouldn't --  
18 what did you mean by that?

19           MR. BAASCH: So it's just like any -- any  
20 corporation doing business -- doing business nationally.  
21 It might be headquartered in a specific place, but  
22 they're sending out goods and services that affects the  
23 country nationally.

24           You can imagine a pharmaceutical company that's  
25 headquartered in --

1           THE COURT: They do. But they do it out of  
2 Kansas. The outfit up in Dallas is just more repair and  
3 rehabilitation of parts. I mean, I hear what you're  
4 saying, but this strikes me as an enormous reach to  
5 target these investigations, when none of the crashes  
6 happened in Texas. The bolt didn't fall off in Texas. I  
7 don't understand the DEI request, how they relate to this  
8 investigation. This is your weakest argument. I kind of  
9 want to stay focused on facial.

10           MR. BAASCH: Certainly, Your Honor. And I  
11 would like to as well. I'll move past the underlying  
12 facts of the investigation, although I'm happy to answer  
13 more questions about them if you wish.

14           THE COURT: Well, I want to let you go forward  
15 if you think the facts of the underlying investigation  
16 have importance or relate to whether or not the statute  
17 remains viable. If you -- if those underlying facts you  
18 believe they are, then I want to hear you. But I  
19 understand -- I don't have blinders on when I have a  
20 facial analysis here. But I -- the underlying facts I  
21 don't think are as relevant. And, if I'm wrong, somebody  
22 needs to tell me.

23           MR. BAASCH: Certainly, Your Honor. I do not  
24 think the facts are relevant to the facial challenge, and  
25 that's because it's well established, under a facial

1 challenge, it's Spirit's burden to show the statute is  
2 unconstitutional in every single application.

3 Now, an as-applied challenge might, as  
4 Your Honor indicated earlier, those underlying facts  
5 might be quite a bit more relevant if we were just  
6 talking about this RTE. But they're saying the entire  
7 statute is unconstitutional.

8 THE COURT: Right. Right.

9 MR. BAASCH: And I think, respectfully,  
10 Your Honor, they have to make the facial argument. They  
11 really don't have an as-applied argument because the  
12 *Patel* argument doesn't work as-applied. We gave them 20  
13 days. So this whole argument about immediacy, they've  
14 got no options, it just doesn't work.

15 THE COURT: You gave them 20 days, but by what  
16 authority did you have the right to give them 20 days?  
17 By what authority do you have the right to give them 10  
18 days or 30 days? In other words, it's clearly a  
19 discretionary act on the part of the Attorney General  
20 that's not written into the statute at all.

21 MR. BAASCH: I'm happy Your Honor asked that  
22 question. That was going to be one of the places I go to  
23 next. The statute authorizes the Attorney General to  
24 seek immediate access. That's -- that's basically the  
25 fact pattern of *Annunciation House*. We thought that that



1 authority was -- it was necessary to use that authority  
2 in its strongest form in *Annunciation House* because of  
3 facts specific to that case. But the statute doesn't  
4 insist that we must demand records immediately. I don't  
5 think it would make any sense if it did. We're the ones  
6 that has to send the written notice to the corporation  
7 saying we want records in the first place. Naturally, we  
8 can decide when that written request is going to be  
9 submitted, and I think it's natural to infer that we can  
10 decide when the records must be produced.

11 THE COURT: But you've used words like  
12 "natural" and "infer" not in the statute. Why aren't  
13 they in the statute?

14 MR. BAASCH: I think that goes back to my point  
15 about when the statute was written, Your Honor. It's  
16 over 100 years old. No legislature would write the  
17 statute exactly the same way today. There are many  
18 administrative subpoena statutes in the Texas Code that  
19 are written differently and that I think account for  
20 developments that occurred in the 20th century. These  
21 statutes are just written in a more elegant way today.

22 But, as we pointed out in our briefs, it's  
23 common for courts to look at subpoena statutes like this  
24 that don't have a time for compliance and to read in a  
25 reasonable time to comply qualifier. We cited an opinion

1 from Judge Jordan to that point. I think it's the *ESI* --  
2 forgive me, Your Honor. I don't have the name of the  
3 case memorized -- case. And Judge Jordan in that case  
4 cited to a number of other federal cases. There's a  
5 Fourth Circuit case about grand jury subpoenas,  
6 explaining how courts will read in a reasonable time  
7 qualify if there is no set time frame for compliance.

8 And I think, Your Honor, all we ask is that the  
9 same apply here. There's no reason why the same analysis  
10 shouldn't apply here. If Your Honor were, by contrast,  
11 to take Spirit's invitation and to read "immediate" to  
12 mean it has to be on the spot, it can never be later --

13 THE COURT: I know. But that's exactly what  
14 you -- maybe it was you, but one of your colleagues  
15 argued in *Annunciation House*. Immediate means immediate.

16 MR. BAASCH: And the only point I think that's  
17 relevant here from that posture, or I think the reason  
18 why *Annunciation House* is highly distinguishable, I  
19 should say, is that we took the position there that we  
20 had authority to seek it on the spot. The reason why we  
21 took to that position in *Annunciation House* is because  
22 there were strong indications that *Annunciation House* was  
23 engaged in criminal conduct and would destroy documents.  
24 And so our position is, hey, this statute that we usually  
25 use to allow 20 days for --

1 THE COURT: Can I ask you, did the DA -- was  
2 this El Paso County?

3 MR. BAASCH: It was.

4 THE COURT: Did he invite the AG's Office in to  
5 conduct this criminal investigation?

6 MR. BAASCH: I'm not sure I'm able to make --

7 THE COURT: I don't think he did. So by what  
8 authority did the Attorney General's Office have to  
9 investigate a crime that occurred in El Paso?

10 MR. BAASCH: Certainly, Your Honor. So the  
11 Attorney Generals Office is always able to investigate  
12 corporations chartered in Texas for compliance with their  
13 governing documents or for compliance with all of the  
14 laws of the State of Texas. That's in the Business  
15 Organizations Code 12.153.

16 THE COURT: I know. But -- but you're -- so  
17 you're telling me, then, that they're allowed to conduct  
18 criminal investigations under that rubric, right?

19 MR. BAASCH: Allowed to investigate crimes and  
20 then impose civil penalties.

21 THE COURT: Okay. But then on the flip side,  
22 you're telling me the Class B misdemeanor that's  
23 authorized in the RTE statute, the Attorney General's  
24 Office doesn't have the independent right to pursue that  
25 criminally.

1 MR. BAASCH: That's absolutely right,  
2 Your Honor.

3 THE COURT: That just seems a little  
4 180 degrees to me.

5 MR. BAASCH: Well, the state of the Texas high  
6 courts case law on this might not be the most intuitive,  
7 but the Texas High Criminal Court has concluded we cannot  
8 prosecute, full stop, period, without a district  
9 attorney.

10 By contrast, we can investigate crimes and then  
11 impose a civil penalty, such as forfeiture of the  
12 corporate charter. That's what's at issue in  
13 *Annunciation House*. The crimes are the predicate for the  
14 penalty of corporate charter forfeiture.

15 THE COURT: And isn't that also here with the  
16 *quo warranto* proceedings that are authorized if you want  
17 to, to go against Spirit?

18 MR. BAASCH: If they -- if they refused to  
19 comply, that be an authorized penalty. That's right,  
20 Your Honor.

21 THE COURT: As it relates to the Class B  
22 misdemeanor, could not the AG's Office just marry up with  
23 a DA, pick a DA. I don't know how many we have. We  
24 have, what, 254 counties. We have fewer DAs. But  
25 couldn't the AG's Office just marry up with the

1 cooperating DA and then pursue charges, if it wanted to.

2 MR. BAASCH: Potentially, Your Honor. We're  
3 not hiding from that fact here.

4 THE COURT: Okay. So the AG's Office may not  
5 have statutory authority to move forward criminally, but  
6 they do have the ability to do so under certain  
7 circumstances.

8 MR. BAASCH: Well, I think I would caveat that,  
9 Your Honor, by saying we need -- we would need a district  
10 attorney to ever initiate a criminal action under the  
11 current state of --

12 THE COURT: I know. But the current world  
13 we're living in, you can find a DA that will help you  
14 with that.

15 MR. BAASCH: Sure, Your Honor. We're not  
16 saying that it's impossible that a misdemeanor -- that  
17 the misdemeanor provision could ever be enforced. But  
18 they're making a facial challenge. They have to show  
19 it's unconstitutional in every application, and they  
20 can't point to a single application where a district  
21 attorney has ever enforced that misdemeanor provision.  
22 And certainly we have no ability to do it on our own.

23 THE COURT: What does that have to do with the  
24 facial analysis, that it's never been challenged before?  
25 I mean, clearly, we wouldn't be talking if we were in the

1 1940s, for instance. Here we are where we are. We're  
2 talking in the wake of *Los Angeles v. Patel* and some of  
3 the other more recent cases that kind of changed the  
4 analysis and changed the -- and hardened the review of a  
5 100-year-old statute. At least that's my opinion on the  
6 subject.

7 I'm sorry. I told you that I'd interrupt you,  
8 but I don't want to do so. I want you to -- I want you  
9 to continue with your arguments.

10 MR. BAASCH: Certainly, Your Honor. Well, I  
11 want this to be most useful for the Court, so I'm happy  
12 to take your questions instead of going through my  
13 presentation.

14 THE COURT: Well, I keep -- I keep getting you  
15 off your game. I don't mean to do that. I want you  
16 to -- I'm not going to interrupt you again. Go ahead.

17 MR. BAASCH: Thank you, Your Honor. I think  
18 this slide is actually the most critical one in the whole  
19 slide deck.

20 Spirit has many options for pre-compliance  
21 review. The first one I want to go over is an  
22 *ultra vires* claim seeking injunctive relief. My friend  
23 on the other side made some representations about the  
24 availability or not of an *ultra vires* claim that are  
25 simply not true, they do not accurately convey what the

1 Supreme Court of Texas decided just last term in *State v.*  
2 *Zurawski*.

3           So in *State v. Zurawski*, the Supreme Court  
4 concluded that a declaratory judgment action was  
5 available to challenge the constitutionality of the  
6 statute at issue there. The Supreme Court of Texas also  
7 said -- and I have the footnote on-screen here -- that a  
8 plaintiff who alleges a state actor is improperly  
9 applying the law through an enforcement action may bring  
10 an *ultra vires* claim against that official.

11           That's exactly what we have said that Spirit  
12 can do here. A declaratory judgment action according to  
13 *State v. Zurawski* might not be available but an  
14 *ultra vires* claim absolutely is.

15           THE COURT: So break that down for me. You're  
16 saying that Spirit would have the right to file an action  
17 against the AG's Office. And what would their claim be?

18           MR. BAASCH: It would be an *ultra vires* claim  
19 seeking injunctive relief. And we -- there's an example  
20 on the next slide where a party did this under the RTE  
21 statute, did this exact thing. Granted, it was many  
22 decades ago, but I don't think the Court should strain to  
23 conclude that pre-compliance review is not available  
24 when, by all indications, it is.

25           THE COURT: No. All right. I'm going to

1 apologize again. I've lied to you too many times. I'm  
2 probably going to keep interrupting. So I want to break  
3 down the *ultra vires*. As I understand the way that  
4 works, they would file an action saying the AG doesn't  
5 have the authority to do this, and then we would look at  
6 the RTE statute and we'd go it appears -- and trust me on  
7 this, I'm not quibbling with the fact that attorney  
8 generals across to United States have the right to seek  
9 information from corporations that are operating in their  
10 state. That's not what we're talking about.

11           So they would file the action saying the  
12 Attorney General is out of line here, Judge. They're  
13 operating outside the rubric of the RTE statute. But if  
14 you look at the RTE statute, that wouldn't be the case.  
15 I think you'd say, No, the AG is operating under the  
16 authority given to it under the RTE statute. That's  
17 where it ends. There's not a reasonableness inquiry into  
18 what the Attorney General's Office actually asked for.

19           MR. BAASCH: I could tell you exactly how they  
20 would make their argument in state court. I'll almost  
21 write the petition for them from the podium here.

22           The *ultra vires* claim is available if we are --  
23 if the Attorney General is not complying with the statute  
24 or with the Constitution. The way that they can make a  
25 reasonableness argument is to say that the Fourth



1 Amendment requires the Attorney General to act reasonably  
2 when he issues administrative subpoenas. We don't  
3 believe this administrative subpoena was reasonable  
4 because of reasons X, Y, and Z, and we're saying it's not  
5 in compliance with the Fourth Amendment for that reason.

6 Reasonableness review is a Fourth Amendment  
7 doctrine, and the *ultra vires* claim is available for  
8 constitutional claims.

9 THE COURT: But the RTE statute that gives the  
10 AG's Office the authority to seek this information  
11 doesn't say anything about reasonableness.

12 MR. BAASCH: That's right, Your Honor. And I  
13 go back to the fact that it's over a 100-year-old  
14 statute, but the statute must be interpreted against the  
15 backdrop of the Constitution. The Texas Supreme Court  
16 has said that repeatedly, that you should not read the  
17 statute to just carve out the Fourth Amendment and say it  
18 doesn't exist in this world. No. The Fourth Amendment  
19 should be incorporated into how you interpret the  
20 statute, the Fourth Amendment commands reasonableness  
21 review, and so they could go to a Texas State Court  
22 tomorrow and they could say we want our reasonableness  
23 review. Because if this isn't reasonable, then the Texas  
24 Attorney General has violated the Fourth Amendment. They  
25 can do that. It's our position that they can do that,

1 and I think the case law reflects they can do that.

2           *Zurawski* says that basically explicitly here.

3           If you'd go back -- forward one slide, Matt.

4 Thank you.

5           And then this is an example -- this  
6 *Chesterfield* case is an example of an RTE recipient, so  
7 it's this exact context, bringing an action for an  
8 injunction pre-compliance. So here you see it. A Texas  
9 Intermediate Appeals Court, I think one that this Court  
10 should defer to or maybe must defer to under *Erie*,  
11 entertaining an action for an injunction.

12           My friend's only response to this case was to  
13 say, well, that case didn't actually address sovereign  
14 immunity. And, granted, that's technically true. But I  
15 don't think we should just presume that the availability  
16 for review that this court found would not be available  
17 in a subsequent case.

18           I mean, maybe the Texas Supreme Court would say  
19 that. I don't think they would, but we shouldn't presume  
20 it, especially when the State Intermediate Court of  
21 Appeals has entertained the exact -- almost the exact  
22 suit that Spirit wants to bring here.

23           So that's the *ultra vires* claim for injunctive  
24 relief, but there's other options, too.

25           The second option would be subpoena recipients

1 as a general matter under Texas state law can achieve  
2 pre-compliance review through an action for protective  
3 order under the State's generally applicable rules of  
4 civil procedure. The *Alliborne* case recognized this.

5 This was a subpoena recipient that filed a  
6 petition for a protective order. My friend from the  
7 other side indicated, well, that's only because in that  
8 specific case the medical board's governing statute, the  
9 occupation code, allowed for that remedy. And so I guess  
10 Spirit is saying it wouldn't be available here, but it is  
11 available here.

12 The recipient in that case sought a protective  
13 order under generally applicable rules of civil  
14 procedure, Rule 176.6 and 192.6. Spirit can take  
15 advantage of the same generally applicable rules of the  
16 civil procedure to get up -- to seek a protective order.  
17 And this is another Texas Intermediate State Court of  
18 Appeals opinion recognizing that this form of review is  
19 available, and I don't understand how Spirit could come  
20 here and insist that that just shouldn't be followed.

21 You see it again in another -- from another  
22 court that this one -- that this Court is bound by, the  
23 Fifth Circuit. I recognize it's an unpublished opinion,  
24 but the Fifth Circuit here recognizing that a protective  
25 order is available in Texas State Court.

1           A subpoena recipient can move for a protective  
2 order in Texas State Court. The Fifth Circuit did not  
3 say there that's only available for Texas Medical Board  
4 subpoenas. No. It's generally available.

5           THE COURT: But is what you've given to Spirit  
6 probably characterized as a subpoena?

7           MR. BAASCH: I think it is, Your Honor. And  
8 the reason why it is -- and our opening brief has some  
9 case law on the difference between a search and a  
10 subpoena. A search implies that some entry has occurred  
11 and that something has been taken. A subpoena is just a  
12 document, like a grand jury subpoena, requesting  
13 information. And that's exactly what the request to  
14 examine --

15           THE COURT: Just curious. I don't recall.  
16 What was your demand styled as?

17           MR. BAASCH: It's styled as a request to  
18 examine.

19           THE COURT: Okay.

20           MR. BAASCH: The -- I recognize that the  
21 language of the letter is a little wonky or the styling  
22 is a little wonky. We're just borrowing that from the  
23 statute. But the substance of the letter, the first page  
24 of the letter, says: Produce these records within 20  
25 days. And it tells Spirit who to send the records to.

1 It tells them they could send them digitally. It's  
2 absolutely a subpoena, Your Honor. It doesn't  
3 contemplate a search. It doesn't contemplate entry.  
4 There's no example in the RTE statute's enforcement  
5 history ever of physical entry occurring or a physical  
6 search occurring.

7 So that's their protective order option.

8 And then they have a third option. I think  
9 candidly I'll recognize this is the weakest option.  
10 Maybe in light of *Zurawski* maybe it's no longer on the  
11 table. But the *Humble Oil* case said that an action for a  
12 declaratory judgment is available.

13 *Zurawski* didn't overrule *Humble Oil*. *Humble*  
14 *Oil* is directly on point. I would submit that, until the  
15 Texas Supreme Court says otherwise, *Humble Oil* provides  
16 that a declaratory judgment action is available.

17 But, of course, you don't need to there,  
18 because the *ultra vires* claim and the option for  
19 protective order are both clearly available under  
20 recent -- very recent Texas Supreme Court, Texas Court of  
21 Appeals, and Fifth Circuit precedent.

22 THE COURT: And that's where I'm confused by  
23 what a facial analysis of the statute is as opposed to  
24 what the AG's Office and what has been adopted over  
25 100 years. And that is it seems to be what's happened

1 is, clearly, the statute itself is -- is not  
2 appropriately written in today's day and time. It's not.

3 But it's being "Frankenstein-ed" and held  
4 together through representations by folks like you from  
5 the AG's Office that we don't do that. We provide the  
6 20-day grace period most of the time. We'll give  
7 extensions. We're very reasonable people. And we  
8 encourage -- we now put the language in our request to  
9 examine than you can seek pre-compliance. But all of  
10 that is not in the statute itself.

11 And whether it's this AG or the next AG, can't  
12 the next AG just say, no, we're not -- we're not going to  
13 provide the 20 days. We're just going to move forward.  
14 And I know what your answer would be: Well, Judge, that  
15 would be the perfect vehicle, then, by which to look at  
16 whether or not the statute -- but it goes back to a  
17 facial analysis as opposed to an as-applied analysis.

18 I thought I was supposed to just look at how  
19 this statute is worded and whether it authorizes what the  
20 Attorney General's Office is seeking.

21 MR. BAASCH: Certainly, Your Honor. I've got  
22 two responses there. The first response is that the  
23 facial challenge burden for them is to show that it's  
24 unconstitutional in every application. I think what  
25 Your Honor is asking is, Well, how far can I look to see

1 what the possible range of applications are?

2 I don't think you just need to stick to the  
3 strict terms of the statute for a number of reasons. One  
4 is that Texas courts are supposed to strain to read  
5 statutes in a constitutional way, not in an  
6 unconstitutional way. So I think you indulge every  
7 presumption that the statute can be interpreted  
8 constitutionally.

9 Two, I think you look at the backdrop of case  
10 law that exists in Texas showing, both in the RTE context  
11 and in other highly related contexts, that pre-compliance  
12 review is available. That's not written into the  
13 statute; I recognize that, Your Honor. But it is written  
14 into the Texas State Code and the protective order  
15 provisions. It is recognized by the Texas Supreme Court.  
16 I don't think you can just ignore all that.

17 THE COURT: I don't think I can either, but  
18 you-all make the argument I shouldn't even look at  
19 *Annunciation House*. It's hard for me to do, because the  
20 AG's Office speaks with one voice, not two mouths. And,  
21 recently, colleagues of yours in El Paso have said, Well,  
22 yeah, that may be good in most cases. But in this one  
23 we're moving forward without pre-compliance review.  
24 We're not -- we're not suggesting for a moment that  
25 *Annunciation House* has the right to pre-compliance

1 review. That's what troubles me here, is the enormous  
2 amount of discretion that's been given to the AG's  
3 Office.

4 MR. BAASCH: Well, two points about  
5 *Annunciation House*, Your Honor. The first point is that  
6 I don't think Your Honor needs to ignore that case. In  
7 fact, I think that case is quite fatal for Spirit. It  
8 shows that an as-applied challenge can be made and  
9 perhaps made successful if the facts are right.

10 So if the future Attorney General that you're  
11 hypothesizing says, No, no, no. Immediate. You must  
12 give it to us right now. We're going to show up at your  
13 door and we're going to demand the records right now.  
14 Well, you've got an as-applied challenge to the statute  
15 there. That's what *Annunciation House* did. Maybe that  
16 will be successful.

17 We take the position that *Annunciation House*  
18 was wrongly decided -- it's on appeal to the Supreme  
19 Court of Texas -- because there were exigent  
20 circumstances in that case that necessitated the  
21 immediate access. But that's a one-off. That's an  
22 as-applied challenge. Those are very unique facts. The  
23 only reason we demanded immediate access was because of  
24 those unique facts. And the only reason we think it  
25 could be constitutionally applied in that setting is



1 because of those unique facts.

2 By contrast, in the mine-run of cases, we don't  
3 demand immediate compliance, and we don't think it can be  
4 constitutionally demanded either. If there is no  
5 exigency, we don't think we can just say give us the  
6 documents right now for no pre-compliance review. And  
7 that's why with Spirit, 20 days -- actually, it's been  
8 five months, really. No compliance by them and no  
9 penalties either.

10 THE COURT: But do they sleep well at night  
11 knowing that the next day you could file that action? I  
12 mean, that's part of the problem here, is the chilling  
13 aspect of the what the Attorney General's Office could  
14 do. You keep telling me, Oh, but we're benign. We don't  
15 do that. We're nice. But how does the other side know  
16 when the hammer may drop?

17 MR. BAASCH: So Spirit knows the hammer won't  
18 drop before the time to comply lapses. And right now,  
19 pursuant to a stipulation, they have until at least  
20 November 4th. We can't do anything before then because  
21 they're not in noncompliance before November 4th.

22 But I would also like to talk for just a  
23 second, Your Honor, about what would happen if we were in  
24 that noncompliance world. Nobody from Spirit is getting  
25 arrested or prosecuted. What would happen -- and this

1 happened in *Annunciation House* -- is that we might, if we  
2 decide it's warranted, petition for what's called a  
3 *quo warranto* action to revoke their corporate charter in  
4 Texas.

5 And in that context they can get all the review  
6 they want. They can say as a defense to the *quo*  
7 *warranto*, Well, hey, this RTE was invalid, it was  
8 unreasonable, et cetera, et cetera. They're still going  
9 to get pre-compliance --

10 THE COURT: That's not pre-compliance review.  
11 That's pre-sanctions review and post-review. That's your  
12 weakest argument. So ...

13 MR. BAASCH: Sure, Your Honor. I don't want to  
14 get hung up on that point here, because that's obviously  
15 not where we are. But, if I may, I would just like to  
16 very briefly address a few other points by Spirit.

17 So the first point, and we talked about this a  
18 bit, is that the statutory command of immediate  
19 compliance implies a reasonable time frame. There's  
20 ample case law supporting that proposition, including  
21 Judge Jordan's opinion and the many cases that he cited  
22 there.

23 The second thing I want to emphasize -- I think  
24 we've talked a little bit about this -- no possibility of  
25 physical entry. Never has occurred. None of the parties

1 in this litigation have ever identified it occurring.

2           The third point I want to emphasize -- this is  
3 again from the *Zurawski* opinion -- is that the Supreme  
4 Court has recognized that action -- this is analogous,  
5 not directly these circumstances, Your Honor. But it is  
6 recognized that parties don't even have standing to  
7 enjoin the Attorney General from moving forward with  
8 criminal sanctions because the Attorney General has no  
9 authority to proceed with criminal sanctions.

10           I think this goes to your point about district  
11 attorneys. Yes, it's possible. It's highly speculative  
12 that we could partner up with a district attorney and  
13 prosecute that misdemeanor. But the Supreme Court -- the  
14 Supreme Court of Texas knows that, but it has  
15 nevertheless recognized that parties generally don't even  
16 have standing to complain about the Attorney General  
17 initiating criminal enforcement.

18           I think that goes to the fact that this is a  
19 facial challenge. They've got to show it's  
20 unconstitutional in every application, not just that,  
21 hypothetically, one day maybe we'd partner up with a  
22 district attorney.

23           The final point is *Annunciation House*.  
24 *Annunciation House* we think was wrongly decided. It's on  
25 appeal. But the most critical point I want to emphasize

1 about *Annunciation House* is that the court there actually  
2 allowed us to issue more administrative subpoenas under  
3 the statute. And the court simply said, I, the court, am  
4 going to conduct pre-compliance review of those  
5 subpoenas.

6 We've got no objection to a court here  
7 conducting pre-compliance review of Spirit's subpoena.  
8 That's why we've extended the deadline by five months.  
9 Even *Annunciation House*, by far their best case, does not  
10 go as far as they need it to go.

11 And with that, Your Honor, I -- that's the end  
12 of my presentation.

13 THE COURT: Can I ask you -- and this is pure  
14 ignorance -- were there other means by which you could  
15 have gotten information from Spirit? In other words, I  
16 don't want to dive into the as-applied analysis. But the  
17 AG's Office chose the RTE vehicle by which to acquire  
18 this but make the argument in briefing that we're trying  
19 to advance an interest to protect the people of Texas for  
20 the Texas Deceptive Trade Practices Act or the business  
21 code. Why didn't you lay down an administrative subpoena  
22 under those provisions to get the information? Was there  
23 a tactics reasons?

24 MR. BAASCH: Certainly, Your Honor. There is a  
25 number of statutes that -- more modern statutes that

1 authorize administrative subpoenas. But they're all  
2 different. They don't necessarily provide the scope that  
3 the RTE statute provides. And Your Honor raised the  
4 Deceptive Trade Practices Act statute. That -- to issue  
5 a subpoena under that statute, we have to be seeking  
6 evidence of misleading or deceptive practices. And our  
7 experience, and I think what Spirit would likely argue  
8 here, is, well, a lot of what you're seeking couldn't  
9 plausibly be related to misleading or deceptive  
10 practices. Therefore, we're not going to give it to you.  
11 And you've got to have that whole fight of whether it  
12 comes within the scope of that relatively narrow grant  
13 for an administrative subpoena.

14 But the business organization code with the  
15 request to examine statute, we can seek records more  
16 generally.

17 THE COURT: Okay. Okay. Thank you.

18 MR. BAASCH: Thank you, Your Honor.

19 MR. MARTENS: Briefly, Your Honor?

20 THE COURT: Yeah. You guys take your time.

21 MR. MARTENS: Well, thank you for that.

22 THE COURT: I'm not in a hurry.

23 MR. MARTENS: I appreciate that.

24 Your Honor, so I'd like to cover a couple of  
25 points here. And, first, my colleague made great -- made

1 a big deal about the arrest on the spot language in  
2 *Patel*. The AG can arrest -- criminally arrest on the  
3 spot for failure -- for the misdemeanor violation of  
4 failure to comply with an RTE. We cite that in our  
5 summary judgment opposition brief. Texas criminal  
6 Procedure, Section 2.122 defines a peace officer as  
7 investigators commissioned by the Attorney General. And  
8 Section 14.01(b) says a peace officer may arrest an  
9 offender without a warrant for any offense committed in  
10 his presence or within his view.

11 THE COURT: Right. And I agree. They can make  
12 the arrest; they can't make the prosecution.

13 MR. MARTENS: Right. And they couldn't in  
14 *Patel*. The same thing. The police officers in *Patel*  
15 couldn't make the prosecution. They had to go to another  
16 authority to prosecute.

17 THE COURT: But Mr. Baasch would say that's not  
18 what's happening here. We're not making that threat. We  
19 didn't do that in *Annunciation House*. We haven't done  
20 it. We've got an investigator who provided an affidavit  
21 who said he's not aware of it ever been done. Does that  
22 change --

23 MR. MARTENS: *Patel* was a pre-compliance  
24 review, and no one was prosecuted there. And the court  
25 found the statute facially unconstitutional. Why?

1 Because the -- what the court said is that you decide  
2 facial constitutionality based on what the statute says,  
3 not what the AG doesn't do.

4 In other words, what they're in here arguing is  
5 saying: Don't worry about the statute. We're not going  
6 to enforce it. And so that's an example of when it won't  
7 be unconstitutionally applied. Respectfully, that's  
8 nonsense. You can't say, if I don't apply the statute,  
9 there's an example of it not being applied  
10 unconstitutionally.

11 And that's not just my view. That's the  
12 Supreme Court's view in *Patel* where they said on page --  
13 on page 419, quote: But when assessing whether a statute  
14 meets the standard, meaning the standard for a facial  
15 challenge, the court has considered only applications of  
16 the statute in what it actually authorizes or prohibits  
17 conduct.

18 In other words, you don't look at what they  
19 won't do if they don't apply the statute. You look at  
20 what the statute authorizes them to do, and you say: Is  
21 that constitutional? Because for good reason. We don't  
22 leave citizens to sit there and decide on the spot, Will  
23 the AG exercise his discretion not to enforce the statute  
24 or won't he? Because faced with that, any sane citizen  
25 would say I'm not taking that risk. I'm going to comply.

1 I'm not going to rely on the good graces, or as the AG  
2 put it, "a matter of grace" from the Attorney General.

3 And so that's the problem. It's not that the  
4 AG can say I won't enforce it. The facial problem is  
5 that he can enforce it. And as written, or to use  
6 *Patel's* words, when you look at, quote, what it actually  
7 authorizes or prohibits, when you look at that, that's  
8 the problem. What it actually authorizes is criminal  
9 prosecution. And any -- any and every application of  
10 that, that possibility being out there, that threat being  
11 out there, is exactly what renders the statute  
12 unconstitutional, because every single citizen who  
13 receives an RTE is faced with that threat and the choice  
14 of whether to comply or not comply.

15 The AG might say I won't do it. That's not  
16 binding. You couldn't bring a lawsuit later and say,  
17 Well, you said you weren't going to do it.

18 THE COURT: Is it cured by the fact that  
19 they -- the Attorney General's Office has not done that  
20 and has acknowledged the need for pre-compliance review  
21 and encouraged you to do that? Does that cure the  
22 problems with the statute.

23 MR. MARTENS: I just come back to *Patel*. The  
24 court considers only applications of the statute in which  
25 it actually authorizes or prohibits conduct. The only



1 thing that you consider, because the only thing the *Patel*  
2 court considered, is what the statute authorizes.

3           And to -- but even if you want to look at that  
4 conduct, it doesn't save the statute. The fact that they  
5 have not prosecuted it in any situation previously in no  
6 way binds them to say they can't prosecute in the future.  
7 And so to take the Spirit folks or anyone else at  
8 Annunciation House or otherwise who receives an RTE, are  
9 they to defy the statute and defy the request and say,  
10 well, you know, I'll take my chances. It's never been  
11 prosecuted in the past.

12           *Patel* says no. *Patel* says, in evaluating a  
13 facial challenge, you look at what the statute  
14 authorizes, because the Fourth Amendment is meant to  
15 protect us against the whims of the government. We're  
16 not meant to be left there wondering, Will he exercise  
17 his discretion or won't he?

18           In fact, the whole purpose of *Patel* is to put a  
19 judge between that, to put a judge between citizens and  
20 the exercise of the AG's discretion. The whole point of  
21 *Patel* is to make sure people aren't left to that  
22 discretion. That's what the court says in *Camara*, which  
23 is quoted in *Patel* -- the court in *Camara v. City and*  
24 *County of San Francisco*. The court said you cannot,  
25 quote, leave the occupant subject to the discretion of

1 the official in the field, end quote. Why? Because,  
2 quote, that's precisely the discretion to invade private  
3 property, which we have consistently circumscribed by a  
4 requirement that a disinterested party warrant the need  
5 for the search.

6 THE COURT: And which case is that?

7 MR. MARTENS: That's *Camara v. Municipal Court*  
8 *of City and County of San Francisco*, 387 U.S. 523 at  
9 pages 532 and -33. We cite it in our case in our briefs,  
10 and the court in *Patel* cites it for that very proposition  
11 that they're here saying, Don't worry, our discretion.  
12 And as -- as American citizens, we're not subject to  
13 their discretion -- the Executive Branch's discretion.  
14 We're entitled to, under the Fourth Amendment, a judge to  
15 stand between us and the investigators. That's been the  
16 consistent point of the Fourth Amendment throughout its  
17 history. It was reaffirmed in that case I just cited,  
18 *Camara*; it was reaffirmed in *Patel*.

19 And so their whole argument, which is "don't  
20 worry, sometimes we don't apply it unconstitutionally,"  
21 doesn't save the statute. The question is, Does the  
22 statute authorize unconstitutional conduct? Yes. And  
23 their exercise of discretion not to use the statute is  
24 exactly what *Camara* says doesn't save the statute.

25 And so that's the biggest problem with their

1 argument, is they're here saying, in essence, trust us.  
2 And that's great if you're not on the potential criminal  
3 prosecution end. But that's not enough.

4 Second point: The AG has yet to cite a single  
5 case in which any court has said that sovereign immunity  
6 allows a challenge to an RTE. No court has ever said  
7 that. They have never cited one.

8 And I want to go back and address the language  
9 in the slide deck that was used. I don't know if my  
10 colleague would be so kind as to put the *Zurawski* -- and  
11 I know I caught you off-guard there.

12 THE COURT: That's all right. I have it here.

13 MR. MARTENS: Your Honor has it. So it's  
14 page 9 on the slide deck.

15 THE COURT: I'm good.

16 MR. MARTENS: *Zurawski*.

17 THE COURT: Yes.

18 MR. MARTENS: So they -- they quote the  
19 parenthetical here from the *Sefzik* case, and here's what  
20 it says: An applicant challenging an agency's denial of  
21 a permit did not plead a valid declaratory judgment act  
22 claim. Why was it not valid? Because the applicant  
23 didn't challenge the validity of the statute but instead  
24 challenged the validity of the officer's action taken in  
25 applying the statute.

1           That's exactly what the *Patel* 2015 Texas  
2 Supreme Court said. You could have a valid declaratory  
3 judgment action if you challenge the validity of the  
4 statute. But they said that's not what that defendant  
5 did or that party did in his declaratory judgment action.  
6 So it doesn't work. They said, in fact what he did is he  
7 challenged the validity of an officer's actions taken in  
8 applying the statute. That you can't do.

9           And so there's nothing inconsistent between  
10 *Zurawski* and *Patel*. I could challenge the statute, but  
11 what I can't do is go in and raise all of these concerns  
12 that Your Honor sees. Your Honor said this seems like an  
13 overreach. This seems like it's being "Frankenstein-ed,"  
14 you know, all of those arguments. Is DEI within the AG's  
15 jurisdiction? Can he investigate out-of-state parts  
16 manufacturers? Those are all state law questions that I  
17 would like to raise.

18           And to your last question, had they served me  
19 with a CID under the consumer fraud statute, you know  
20 what that statute allows me to do: file an action to  
21 challenge. It's statutorily authorized that I can file  
22 an action to raise those challenges. And what happens  
23 when I file that action: automatically stays the CID  
24 until the court decides it.

25           So you want to know why they didn't use that

1 option when they claim they could: because they're trying  
2 to deny me that right. They're trying to deny me that  
3 option. They've had -- they talk about five months.  
4 They've had five months to switch stream. And, instead,  
5 they haven't because they don't want me making all the  
6 arguments that Your Honor is making about this statute  
7 being -- being an overreach and "Frankenstein-ed" is  
8 exactly what'd want to be arguing in front of a Texas  
9 State Court here in Travis County or in Dallas County.

10 But I'm denied that opportunity because they've  
11 gamed the system with a statute that unconstitutionally  
12 strips me of that ability. And they've yet to cite a  
13 single statute -- a single case that says sovereign  
14 immunity doesn't bar me.

15 And I'll also note they're not even actually  
16 claiming that the text and structure of the RTE statute  
17 allows it. In fact, what you heard Mr. Baasch argue was  
18 you should rewrite the statute. He said you should read  
19 into it. I wrote it down. He said you should read into  
20 the statute a reasonableness requirement.

21 And I just want to point out that that's not  
22 what he told the *Annunciation House* court or his  
23 colleagues told the *Annunciation House* court. They  
24 didn't say read into the statute a reasonableness  
25 requirement. They said that it's a matter of grace to

1 extend any time, and a matter of grace by the Attorney  
2 General.

3           They said that the statute has to be -- that  
4 they have to get at -- that the statute authorizes access  
5 right away. They said, quote, the common, ordinary  
6 meaning of "immediately" is that OAG must be given access  
7 to the records right away.

8           They went on to say -- they said they  
9 contrasted another statute that allows for  
10 interrogatories to corporations on page 11. But they  
11 said, under that statute, someone has 31 days to respond.  
12 Then they said, quote: That is obviously a sharp  
13 contrast from the instruction to permit, quote, immediate  
14 access to the Attorney General.

15           The word -- keep going on. The word  
16 "immediate" meant -- excuse me. The Legislature's use of  
17 disparate timing language within the code confirms that  
18 when it used the word "immediate," it meant what it said.  
19 They continue: The court must enforce the statute as  
20 written.

21           So they as you said, they're talking out of two  
22 sides of their mouths, leaving me again subject to  
23 discretion and every other citizen of Texas subject to  
24 discretion. One minute they say it has to be enforced as  
25 written when it's to their strategic advantage to do so.

1 And then they come into this court and say it doesn't  
2 actually mean that. It means "within a reasonable time."

3 And so I want to know, have they corrected  
4 their misrepresentation to the Texas -- to the court in  
5 El Paso? Because while they're telling you it means  
6 within a reasonable time, they're telling that court it  
7 means as written, with no time whatsoever. They can't  
8 both be true, and yet they've represented both of those  
9 things to this court -- to two courts, leaving Texas  
10 citizens who receive RTE like -- or recipients like  
11 Spirit left to guess will it be enforced right away or  
12 won't it be enforced right away, and who is going to be  
13 subject to criminal prosecution? And that's not what's  
14 allowed under *Camara*. We aren't subject to those whims.  
15 We aren't subject to that discretion.

16 One last point. Mr. Baasch said repeatedly  
17 that this -- that this is pre-compliance review. It  
18 absolutely is not. I can't come to this -- I can't file  
19 an action in federal court and make state -- purely state  
20 law objections to the scope of the Attorney General's  
21 jurisdiction. And, again, not just my view that this  
22 isn't pre-compliance review. A court considered that  
23 argument.

24 We cite the case *Airbnb, Inc. v. City of*  
25 *New York*, a 2019 case applying *Patel*. And on page 494,

1 there the City of New York made the argument, well, you  
2 brought a 1983 action. You got your pre-compliance  
3 review. And the court was, like, no. The court said:  
4 The City has alternatively argued that if pre-compliance  
5 review is required, the court's evaluation of the  
6 ordinance in this litigation would qualify.

7           So they brought a facial challenge, and the  
8 City said, well, you brought a facial challenge to the  
9 statute, so you got your pre-compliance review. The  
10 court said, continued, but any such review by the court  
11 could assess only whether the ordinance on its face was  
12 reasonable under the Fourth Amendment. The court's  
13 facial assessment in this litigation would not give a  
14 particular booking service a forum to challenge any  
15 particular application of the ordinance.

16           And so the court rejected that argument, that  
17 the -- that the 1983 action is pre-compliance review.

18           This is not pre-compliance review. This is not  
19 an opportunity to raise state law objections to the scope  
20 of the particular request. That's what I would have if a  
21 CID was served, that's what we're constitutionally  
22 entitled to under *Patel*, and that's what we have not had  
23 even five months later. Thank you.

24           THE COURT: Thank you, Mr. Martens.

25           MR. BAASCH: Thank you, Your Honor. I'll keep



1 it very brief. There's only three points that I'd like  
2 to address about what my friend on the other side just  
3 said.

4 First the point about whether we've made a  
5 misrepresentation to El Paso in the *Annunciation House*  
6 case. This is very important. There is, first and  
7 foremost, an irony to my friend saying that, Oh, no, you  
8 have to look only at the statute. Don't look at other  
9 case law. Don't look at the Attorney General's  
10 enforcement history, et cetera, et cetera. But then he  
11 wants you to look at *Annunciation House*. You hear it all  
12 throughout his briefs; you've heard it all today. I  
13 don't think you can square that circle.

14 THE COURT: Can I interrupt you there?

15 MR. BAASCH: Certainly.

16 THE COURT: If I take -- I'm taking you at your  
17 word. So if I -- for purposes of analyzing the RTE  
18 statute I ignore *Annunciation House*, isn't it equally  
19 fair for me to ignore AG representations that they  
20 provide grace and encourage parties to seek  
21 pre-compliance review in state court?

22 Aren't those -- both of those issues outside  
23 the analysis of the statute as written and whether or not  
24 it is facially constitutional?

25 MR. BAASCH: I think that that's technically

1 true, Your Honor. And the reason I say "technically" is  
2 because I think there's an important nuance to that.

3 Those examples illustrate ways that that the  
4 statute could be implied, some constitutional, maybe  
5 some -- I don't know what Your Honor's view is on  
6 *Annunciation House* -- maybe some unconstitutional. It's  
7 examples that they could be applied in those different  
8 ways, and Your Honor has to ask as part of the facial  
9 analysis: Is it unconstitutional in every application?

10 We've shown you many that I think are clearly  
11 constitutional. They like to harp on *Annunciation House*.  
12 That's not enough for a facial challenge.

13 As far as whether we made a misrepresentation  
14 to El Paso, no. The point in that litigation was that  
15 the statute authorized us -- it does not require, but it  
16 authorized us to go as far as we did. In order to comply  
17 with the Fourth Amendment, there would have to be an  
18 exigency. We recognize that. The question, really, for  
19 the *Annunciation House* setting is was there an exigency.  
20 That's highly fact sensitive. It's susceptible to an  
21 as-applied challenge. It doesn't move the ball here for  
22 them.

23 I think, in recognition of that, my friend on  
24 the other side pivoted to this point about, well, the  
25 statute just gives them too much discretion, and that's

1 the problem. We've kind of moved on from pre-compliance  
2 review, and now we're just in a world of they can't have  
3 this much discretion.

4 But discretion cashes out in an as-applied  
5 challenge. If we exercise the discretion in an  
6 unconstitutional way, you've got an as-applied challenge.  
7 You've got maybe a party like *Annunciation House* saying  
8 there was no exigency. As-applied challenge. This can't  
9 be done to us. That doesn't work for Spirit.

10 The last -- the thing I'd like to close with,  
11 though, Your Honor, is I'd like to explain what I think  
12 that they can do. They can go to state court tomorrow.  
13 They could seek a protective order. They could bring an  
14 *ultra vires* claim. We would not object to the court's  
15 jurisdiction. We're not raising sovereign immunity.

16 If the court *sua sponte* raises jurisdiction on  
17 its own, Spirit can respond, Well, Your Honor, to the  
18 state court, if you conclude that you don't have an  
19 ability to review this RTE, then the RTE is  
20 unconstitutional under *Patel*. It's one or the other.  
21 Either the state court can review it. That's our  
22 position. Or if the state court says it can't, you're  
23 right in the *Patel* problem. And I think that'd be a win  
24 for them if -- if they're right. If they're not right,  
25 they can go to state court tomorrow. The state court

1 will hear this suit. The state court will be bound by  
2 the authorities that we showed you, providing that  
3 pre-compliance review is available.

4 Thank you, Your Honor.

5 THE COURT: Thank you, Mr. Baasch. Give me  
6 just a minute.

7 Okay. First of all, let me tell you the  
8 briefing in this case was excellent. You guys probably  
9 didn't write it. Probably smart people back at your  
10 respective outfits did. So kudos to them. I thought  
11 they did a great job.

12 You two men did an equally good job here today.  
13 Best part of the job is being in the courtroom and  
14 hearing good arguments by lawyers who know how to  
15 advocate. So well done.

16 But as in many cases or almost all cases, I can  
17 sometimes cut the baby in half. This isn't one of them.  
18 This is one where I'm being called upon to make a ball or  
19 a strike call, and so somebody is going to walk away here  
20 today not as pleased.

21 I think one of my favorite parts of the  
22 briefing is actually in a reply brief that was prepared  
23 by the plaintiff. It's Document 25, page 1. In an  
24 effort to avoid that conclusion, the Attorney General  
25 responds that sometimes he does not apply the RTE statute

1 as written, instead affording request recipients more  
2 time to comply as a matter of grace. But the Founders  
3 enacted the Fourth Amendment precisely so that the People  
4 did not need to rely on the grace of executive officials  
5 to protect their liberties.

6 This grace is accordingly irrelevant to the  
7 facial challenge to the statute. As the Supreme Court  
8 explained in *Patel*, when addressing a facial challenge to  
9 a statute authorizing warrantless searches, the proper  
10 focus of the constitutional inquiry is searches that the  
11 law actually authorizes, not those for which it is  
12 irrelevant.

13 I don't know whether it's just me or my  
14 background as a prosecutor, but I'm a literal guy. I am  
15 black and white, sometimes to the dismay of others. But  
16 when I look at this, it just strikes me this call for me  
17 is easy. The cases that precede *Patel*, they're -- I'm  
18 not throwing them all out by any means, but they're not  
19 as important to me on the question I'm supposed to answer  
20 today that are shaped by the *Patel* case that came out in  
21 2015. It's kind of what's happened, *Patel* speaks for  
22 itself in the few cases that we have since then. And it  
23 just strikes me that, whether by hook or by crook, this  
24 is simply a facial challenge. It's not an as-applied  
25 challenge.

1 I tend to agree with Mr. Martens. I'm -- he  
2 couldn't file a reasonableness action in federal court,  
3 and I really don't want do to it, or an as-applied  
4 challenge here either. So he's here on a facial  
5 challenge.

6 And in doing that, unless I'm wrong, and I  
7 could be wrong, it's about the statute as written. And,  
8 I mean, the AG's Office has to concede the statute is  
9 silent as to pre-compliance review. It's silent as to  
10 the grace or discretion extended to the Attorney General.  
11 It's all been made up. It's bootstrapped.

12 And, you know, I commend the effort. It's an  
13 old statute, and efforts are being made to keep it alive.  
14 But in the wake of *Patel*, pre-compliance review is simply  
15 not there. And the only reason *Annunciation House* is  
16 important is it serves as a current and recent example of  
17 not just any attorney general, but this Attorney General,  
18 taking a completely different position on whether or not  
19 the party is entitled to pre-compliance review or not.

20 Now, whether there are exigent circumstances,  
21 I'll concede that that's a fact-based issue for that  
22 case. But it just strikes me that the language in  
23 support of the Attorney General's actions in *Annunciation*  
24 *House* is a perfect example of why this statute is flawed,  
25 it's age, and its lack of addressing the current state of

1 the law is fatal.

2 I'm not sure exactly what form or shape my  
3 final order is going to take. But, Mr. Martens, I'm  
4 going to charge you with preparing a proposed order for  
5 my signature.

6 As all the lawyers do, you-all normally file  
7 proposed orders that are short and sweet. I don't need  
8 that. I need something more robust. I need something  
9 that clearly explains that the statute's failure to  
10 provide for pre-compliance review is fatal; that the  
11 bootstrapping efforts of the Attorney General's Office to  
12 keep it alive are inadequate; that the proposed  
13 pre-compliance review alternatives that are not written  
14 into the statute are not practically effective for the  
15 reasons you have articulated both here today, but also in  
16 your briefing and, obviously, distinguished Mr. Baasch's  
17 best arguments, which I think center on *Zurawski* and some  
18 of those other cases that he cited.

19 I'll get that, I'll wire-brush it, and then  
20 I'll issue that. But, again, I go back to where I just  
21 started a moment ago. This to me wasn't that hard. I'm  
22 looking at the statute the way it was written. In the  
23 wake of *Patel*, it is no longer valid as far as I'm  
24 concerned.

25 Yes, sir?

1           MR. MARTENS: Is there a time by which you'd  
2 like us to submit that?

3           THE COURT: The sooner the better, but how much  
4 time do you need?

5           MR. MARTENS: Ten days?

6           THE COURT: Yeah. That's fine. So what does  
7 that make it?

8           MR. MARTENS: Today's the 11th. So the 21st, a  
9 week from Monday.

10          THE COURT: All right. That -- by the close of  
11 the 21st and the morning of the 22nd. All right.

12          MR. MARTENS: Thank you.

13          THE COURT: All right. Again, gentlemen, good  
14 job. Thank you.

15          (Proceedings concluded at 10:58 a.m.)

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**REPORTER'S CERTIFICATE**

I, Arlinda Rodriguez, do hereby certify that the foregoing was transcribed from an electronic recording made at the time of the aforesaid proceedings and is a correct transcript, to the best of my ability, made from the proceedings in the above-entitled matter, and that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

/S/ Arlinda Rodriguez

October 16, 2024

ARLINDA RODRIGUEZ

DATE

ARLINDA L. RODRIGUEZ, OFFICIAL COURT REPORTER  
U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (AUSTIN)